

STATE OF NEW YORK

DIVISION OF TAX APPEALS

In the Matter of the Petition	:	
	:	
of	:	
	:	
FRED S. DUBIN AND SARAH K. DUBIN	:	DETERMINATION
	:	
for Redetermination of a Deficiency or for	:	
Refund of New York State Personal Income Tax	:	
under Article 22 of the Tax Law and New York	:	
City Nonresident Earnings Tax under Chapter 46,	:	
Title U of the Administrative Code of the City	:	
of New York for the Year 1983.	:	

Petitioners, Fred S. Dubin and Sarah K. Dubin, 1 Seaside Place, East Norwalk, Connecticut 06855, filed a petition for redetermination of a deficiency or for refund of New York State personal income tax under Article 22 of the Tax Law and New York City nonresident earnings tax under Chapter 46, Title U of the Administrative Code of the City of New York for the year 1983 (File No. 802868).

A hearing was held before Daniel J. Ranalli, Hearing Officer, at the offices of the State Tax Commission, Two World Trade Center, New York, New York, on June 9, 1987 at 1:15 P.M. Petitioners appeared by Joseph A. Gitlin, C.P.A. The Audit Division appeared by John P. Dugan, Esq. (Angelo A. Scopellito, Esq., of counsel).

ISSUE

Whether days worked at home by petitioner Fred S. Dubin can be considered as days worked outside New York State and New York City for purposes of allocating wage and other income to sources within and without the State and City.

FINDINGS OF FACT

1. Petitioners, Fred S. Dubin and Sarah K. Dubin¹, timely filed a joint New York State Income Tax Nonresident Return for the year 1983, together with a City of New York Nonresident Earnings Tax Return. On both the State and City returns, petitioner reported that a portion of the wage income he received from Dubin-Bloome Associates, P.C. (hereinafter "Dubin-Bloome") was derived from New York State and City sources.

2. Petitioner allocated total wage income of \$250,000.00 received from Dubin-Bloome to New York State and City sources based on a percentage determined by placing the total number of days worked within the State and City over the total number of days worked. The following table details the allocation of wage income as shown on petitioner's State and City returns:

Total days in year	365
Less nonworking days:	
Saturdays and Sundays	65
Holidays	9
Total nonworking days	<u>74</u>
Total days worked	291
Total days worked outside New York	<u>261</u>
Total days worked in New York	30

$$\frac{30}{291} \times \$250,000.00 = \$25,773.00 \text{ of New York source wages.}$$

3. On March 22, 1985, the Audit Division issued a Statement of Audit Changes to petitioner for 1983 which proposed, inter alia, to increase Mr. Dubin's wage income derived from New York sources from \$25,773.00 to \$104,026.00 ($124/298 \times \$250,000.00$). Said statement contained the following explanation and computation:

"Days worked at home do not form a proper basis for allocation of income by a nonresident. Any allowance claimed for days worked outside New York State must be based upon the performance of services which, because of the necessity of the employer, obligates the employee to out-of-state duties in the service of his employer. Such duties are those which, by their very nature, cannot be performed in New York.

¹Sarah K. Dubin is involved in this proceeding solely as the result of having filed a joint income tax return with her spouse. Accordingly, all references to petitioner shall hereinafter refer solely to Fred S. Dubin.

Applying the above principles to the allocation formula, normal work days spent at home are considered days worked in New York and days spent at home which are not normal working days are considered to be non-working days.

You have counted numerous days twice.

Based on the information that was submitted, we have recomputed your allocation schedule as follows:

Total Days in Year

365

Saturdays and Sundays	53
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Holidays	9
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Non-Working Days	<u>5</u>
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Total Non-Working Days

67

Total Working Days

298

Less: Days worked outside N.Y.

174

Days worked in N.Y.

124"

4. Based on the aforementioned statement, the Audit Division, on November 22, 1985, issued a Notice of Deficiency to petitioner for 1983 which asserted a tax due of \$10,255.42, plus interest of \$1,782.44, for a total allegedly due of \$12,037.86.

5. Subsequent to the issuance of the Notice of Deficiency dated November 22, 1985, the Audit Division revised its allocation of petitioner's wage income derived from New York sources by increasing the number of nonworking Saturdays and Sundays from 53 to 59 and decreasing the number of total days worked from 298 to 292. As the result of said revision, additional tax due was decreased to \$9,405.00, plus interest.

6. The Audit Division recomputed petitioner's allocation of wage income derived from New York sources based on information furnished by Mr. Dubin in a document entitled "Questionnaire - Allocation of Personal Service Compensation". On the back of said questionnaire, petitioner listed the specific days worked outside New York, the location where he worked and the nature of the duties he performed. The list of days worked outside New York was handwritten and was, in some instances, illegible. Also, the list of days was not prepared in sequential order and a significant number of days was listed more than once.

7. On his list of days worked outside New York per the aforementioned questionnaire, petitioner claimed a total of 38 days where he worked at his home in Norwalk, Connecticut. The actual number of individual dates listed by petitioner on said questionnaire totalled 48. Of the 48 dates listed as worked at home, petitioner also included 22 of said dates as days worked outside New York not at home. The Audit Division allowed the 22 dates as days worked outside New York and disallowed the remaining 26 dates. The following table details the specific dates worked at home:

Days Worked at Home Per Questionnaire	Days Allowed By Audit Division	Days Disallowed By Audit <u>Division</u>
<u>January</u> 2, 3, 4, 5, 6, 7, 12, 13, 14, 15, 16, 17, 18, 19, 20	4, 5, 6, 7, 16, 17, 18, 19, 20	2, 3, 12, 13, 14, 15
<u>February</u> 7, 8, 9, 10, 11, 21, 22, 23	7, 8, 9, 11, 23	10, 21, 22
<u>March</u> 9, 10, 11	9, 10, 11	
<u>April</u> 15, 16, 17	15, 16, 17	

<u>July</u> 1, 2, 4, 5, 6, 7	7	1, 2, 4, 5, 6
<u>August</u> 18, 19, 23, 24, 25	18	19, 23, 24, 25
<u>September</u> 30		30
<u>October</u> 7, 8, 9, 10, 11, 12, 13		7, 8, 9, 10, 11, 12, 13

8. During the year at issue, petitioner was president and chief financial officer of Dubin-Bloome, a professional corporation engaged in the business of consulting engineering, primarily specializing in architectural technology. Petitioner first started his business in 1936 from an office in West Hartford, Connecticut. Sometime in the early 1960's, Mr. Dubin also opened a sub-office in New York City and since the late 1960's or early 1970's petitioner has continuously maintained an office in his personal residence in Norwalk, Connecticut.

9. Dubin-Bloome at all times maintained its corporate headquarters in West Hartford, Connecticut and all its administrative, financial, legal and banking transactions were conducted from said office. Dubin-Bloome's New York City office was primarily an engineering design office and no administrative functions were performed at said office. The New York City office was run by petitioner's partner, Mr. Bloome, and on those days that petitioner worked in the New York City office he would review designs, confer with his partner and occasionally meet with New York clients and various sales personnel. Petitioner was primarily responsible for handling Dubin-Bloome's clients who were located outside New York State.

10. Petitioner's personal residence was located approximately equidistant between Dubin-Bloome's West Hartford, Connecticut office and its New York City office. Mr. Dubin set aside a separate room in his home which was used solely for business purposes and he also maintained a vast quantity of reference material at home. The duties which petitioner performed at home concerned non-New York clients and said duties, if not performed at home, would have been performed at Dubin-Bloome's West Hartford, Connecticut office or at other locations outside New York State.

11. Petitioner submitted in evidence a summary of the days he allegedly worked within

and without the State of New York. On said summary, petitioner claimed that he worked 30 days in New York and 234 days outside the State. The 234 days worked outside New York were comprised of the following component parts:

Worked in and out of home office	35
Preparation at home for examination	3
Saturdays and Sundays on trips	20
Mondays through Fridays on trips outside New York	<u>176</u>
Total days outside New York	<u>234</u>

12. Other than the questionnaire identified in Findings of Fact "6" and "7", petitioner did not submit any evidence to delineate the specific days worked within and without the State and City of New York as claimed on the summary referred to in Finding of Fact "11".

CONCLUSIONS OF LAW

A. The New York adjusted gross income of a nonresident individual is defined by Tax Law § 632(a)(1) as the sum of the net amounts of items of income, gain, loss and deduction entering into Federal adjusted gross income, as defined in the laws of the United States for the taxable year, derived from or connected with New York sources.

B. Tax Law § 632(c) provides:

"If a business, trade, profession or occupation is carried on partly within and partly without this state, as determined under regulations of the tax commission, the items of income, gain, loss and deduction derived from or connected with New York sources shall be determined by apportionment and allocation under such regulations."

C. The regulations of the State Tax Commission in effect during the year at issue, in pertinent part, provided:

"any allowance claimed for days worked outside New York State must be based upon the performance of services which of necessity, as distinguished from convenience, obligate the employee to out-of-state duties in the service of his employer." (20 NYCRR 131.18[a].)

For New York City tax purposes, 20 NYCRR Appendix 20 § 4-4(b) contains a similar provision.

D. In the instant matter, petitioner is entitled to include days worked at home as days worked outside New York since the services he performed at home were done so out of necessity and not for convenience. This matter is distinguishable from the long line of cases which prohibit a nonresident taxpayer from claiming days worked at home as days worked outside New York. In said cases, the nonresident taxpayer's employer is generally located in New York and the taxpayer is usually working out of the employer's New York office. In the case at hand, the employer is headquartered in Connecticut, petitioner primarily works out of the employer's Connecticut office and the services which he performed at home would, if not performed at home, had to have been performed outside New York.

E. The questionnaire referred to in Findings of Fact "6" and "7" is the only evidence petitioner submitted which lists the specific days worked outside New York. As previously noted, said questionnaire was in some instances illegible and not prepared in sequential order and a substantial number of days was listed more than once. Since Mr. Dubin bears the burden of proof (Tax Law § 689[e]), any uncertainty as to petitioner's work location on a specific date must be construed against him. Based on a review of the questionnaire and also the allowance of days worked at home as days worked outside New York, 32.781 percent (99 days worked in New York placed over 302 total days worked) of wage and other income is allocable to New York sources. (See Appendix "A" for a detailed list of nonworking holidays and days worked outside New York.)

F. Petitioner's assertion that he should be allowed 105 nonworking days for Saturdays and Sundays, as opposed to the 59 allowed by the Audit Division, is without merit. In the revised allocation set forth in Conclusion of Law "E", supra, petitioner has been allowed 54 nonworking Saturdays and Sundays, and one Saturday, January 1, 1983, was allowed as a nonworking holiday. The balance of 50 Saturdays and Sundays was allowed as days worked outside New York and, therefore, these days cannot be duplicated as nonworking days. Likewise, petitioner's claim that he worked 234 days outside New York was substantiated only to the extent of 203

days.

G. The petition of Fred S. Dubin and Sarah K. Dubin is granted to the extent indicated in Conclusions of Law "D" and "E", supra; the Audit Division is directed to recompute the Notice of Deficiency dated November 22, 1985, consistent with the determination reached herein; and except as so granted, the petition is in all other respects denied.

DATED: Albany, New York
October 16, 1987

ADMINISTRATIVE LAW JUDGE

APPENDIX "A"

Nonworking <u>Holidays</u> :		<u>Tota</u>
<u>1</u>		
January 1; September 5; November 24; December 26		
<u>4</u>		<u> </u>
Days Worked Outside New <u>York</u> :		<u>Tota</u>
<u>1</u>		
January 2-7; 12-21; 25-27		19
February 1-5; 7-14; 21-23; 25-28		20
March 1-17		17
April 1; 9-19; 25-29		17
May 1-8; 12-15; 26; 28-31		17
June 6; 16-18; 20-29		14
July 1; 2; 4-16; 22; 23; 25-28; 30; 31		23
August 1-6; 8; 11-13; 15-19; 21-25		20
September 1-4; 6-10; 15; 17; 23-28; 30		18
October 2-21; 27-29		23
November 1-4; 21; 22		6
December 13; 14; 17-23		<u>9</u>
		<u>203</u>
Total days in year		365
Less: nonworking Saturdays and Sundays	54	
holidays	<u>4</u>	
other nonworking days	<u>5</u>	
Total nonworking days		<u>63</u>
Total days worked		302
Less days worked outside New York		<u>203</u>
Days worked in New York		<u>99</u>